

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 9, 2019 appellant, then a 70-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that on March 13, 2019 he sustained injuries to his head, neck, and back as a result of being struck by a passenger who he was transporting to medical care while in the performance of duty. On the reverse side of the claim form the employing establishment noted that it had not received all of the witness or police statements regarding the facts surrounding the alleged injury. Appellant stopped work on March 13, 2019.

In a March 18, 2019 primary care telephone note, Dr. Cynthia McNamara, an internal medicine specialist, related that appellant was driving for the employing establishment on March 13, 2019 when a passenger hit him on his back a couple of times and then jumped from the vehicle.

In an April 12, 2019 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. In a separate letter of even date, OWCP notified the employing establishment of appellant's traumatic injury claim and requested additional information from a knowledgeable supervisor. It afforded both parties 30 days to submit the necessary evidence.

OWCP thereafter received an incident report by A.E., an employing establishment police officer, who indicated that on March 13, 2019 appellant advised him that a passenger had punched and slapped him multiple times in the back, head, and neck area while he was driving and that, as a result, he was experiencing neck and back pain. A.E. noted that there appeared to be red marks on appellant's neck and right upper shoulder, and he took photographs of the marks. Because the incident did not occur on the employing establishment's property, he contacted the local police department to speak with appellant and investigate the matter further.

In a voluntary witness statement to the employing establishment police department dated March 13, 2019, D.N., another passenger in appellant's vehicle at that time, alleged that when he and H.P. began to argue, H.P. grabbed him by his shoulder, pushed him, and told him to stop the vehicle.

A March 13, 2019 case/incident report from the local police department indicated that two officers met with appellant after the incident, and noted that he described engaging in a minor verbal argument with a passenger, who ultimately punched him in his back and right shoulder approximately 17 times. The officers observed the red marks on his neck, but suggested they were birthmarks, not evidence of an injury. They then traveled to the residence of the passenger, H.P., who indicated that appellant had accused him of being late, which led to an argument. H.P. further indicated that he had attempted to exit the vehicle, but appellant prevented him from doing so and he eventually exited the vehicle at a nearby intersection without incident. The report also noted that, after reviewing D.N.'s March 13, 2019 statement, the local police contacted him on March 14, 2019 and advised him that appellant had indicated H.P. had struck him 17 times. D.N. responded that "nothing like that happened at all."

In a medical report dated April 15, 2019, Dr. Robert Henry, an internal medicine specialist, noted that appellant presented for follow up for an assault, which occurred on March 13, 2019. On

physical examination he noted bilateral upper extremity pain with range of motion at the shoulder and lumbar and thoracic spine tenderness. Dr. Henry diagnosed neck and back pain and recommended ongoing manual therapy.

In an April 23, 2019 response to OWCP's development questionnaire, J.B., an employing establishment workers' compensation specialist, noted that, based upon reviewing appellant's claim, his statements to various police, and the witness statements, that he was grabbed and pushed and/or shaken by a passenger in the vehicle. She indicated there was no personal animosity between appellant and the passenger and, to her knowledge, appellant had not sustained any other injuries between March 13 and April 9, 2019.

In subsequent letters of controversion dated April 30 and May 23, 2019, J.B. requested that appellant's claim be denied, contending that the evidence submitted was insufficient to establish that the incident occurred as alleged or a valid medical diagnosis causally related to the alleged incident.

By decision dated May 22, 2019, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the events surrounding the claimed injury occurred as alleged. Therefore, it concluded that the requirements had not been met to establish an injury as defined by FECA.

On September 23, 2019 appellant requested reconsideration of the May 22, 2019 decision and submitted additional evidence in support of his claim.

In a letter dated July 23, 2019, Dr. Brian Linde, acting chief of the employing establishment's occupational health services, indicated that he evaluated appellant on March 13, 2019 following an event, which took place during his work hours on that day and which resulted in a work-related injury.

In a letter dated July 29, 2019, Dr. Henry indicated that appellant provided a history of having been hit in the back of his head, neck, and back by a passenger on March 13, 2019. He noted that he first saw appellant for these issues on March 15, 2019 and diagnosed lumbar and cervical strains. Dr. Henry opined that the March 13, 2019 incident "very likely" caused these conditions.

In a letter dated August 6, 2019, Dr. McNamara noted that she saw appellant on March 19, 2019 for an event that took place on March 13, 2019 during his work hours, which resulted in a work-related injury.

By decision dated October 16, 2019, OWCP denied modification.

On October 20, 2020 appellant requested reconsideration of OWCP's October 16, 2019 decision. In support of his request for reconsideration, he submitted a February 13, 2020 letter from the employing establishment, responding to his Freedom of Information Act (FOIA) request, which included a redacted copy of D.N.'s March 13, 2019 voluntary witness statement and the March 20, 2019 police incident report. Appellant also submitted excerpts from the employing establishment's safety manual and his November 5, 2019 request for assistance by his U.S. Senator.

By decision dated November 9, 2020, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.² This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.³ Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).⁴ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.⁶ Its procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.⁷ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁸

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the

² 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

³ 20 C.F.R. § 10.607(a).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

⁵ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁷ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 4 at Chapter 2.1602.5 (September 2020).

⁸ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

⁹ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 4 at Chapter 2.1602.5(a) (September 2020).

evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁰

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹¹ The claimant must present evidence which on its face demonstrates that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹² The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹³

ANALYSIS

The Board finds that OWCP properly determined that appellant's October 20, 2020 request for reconsideration was untimely filed.

A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁴ As appellant's request for reconsideration was not received until October 20, 2020, more than one year after the issuance of OWCP's October 16, 2019 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in denying the claim.¹⁵

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP in its October 16, 2019 decision. The underlying issue is whether he met his burden of proof to establish a traumatic injury in the performance of duty, as alleged.

In support of his untimely request for reconsideration, appellant submitted a February 13, 2020 letter from the employing establishment responding to his FOIA request, including a redacted copy of D.N.'s March 13, 2019 witness statement, and the March 20, 2019 police incident report. As previously noted, clear evidence of error is intended to represent a difficult standard.¹⁶ The evidence must shift the weight in appellant's favor.¹⁷ Although appellant submitted additional

¹⁰ *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

¹¹ *G.G.*, *supra* note 5; *see also* 20 C.F.R. § 10.607(b); *supra* note 4 at Chapter 2.1602.5 (September 2020).

¹² *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *id.* at Chapter 2.1602.5(a) (September 2020).

¹³ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ *Id.* at § 10.607(b); *see R.T.*, Docket No. 19-0604 (issued September 13, 2019); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁶ *Supra* note 11.

¹⁷ *L.W.*, *supra* note 2; *Robert Burns*, *supra* note 7; *see also R.S.*, Docket No. 18-0505 (issued July 24, 2018).

evidence in support of his reconsideration request, this evidence is duplicative and cumulative.¹⁸ In addition, the November 5, 2019 request for assistance and excerpts from the employing establishment's safety procedures are irrelevant to the underlying issue of whether appellant established a traumatic injury in the performance of duty on March 13, 2019, as alleged.¹⁹ Thus, this evidence does not raise a substantial question as to the correctness of OWCP's decision.²⁰

For these reasons, the Board finds that the argument and evidence submitted by appellant in connection with his untimely request for reconsideration are insufficient to shift the weight of the evidence in his favor or raise a substantial question that OWCP erred in the issuance of its October 16, 2019 decision. Accordingly, OWCP properly denied his reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On appeal appellant contends that his October 20, 2020 request for reconsideration was timely submitted on September 29, 2020. However, as explained above, timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in iFECS.²¹ As explained above, appellant's request for reconsideration was not received into iFECS until October 20, 2020, more than one year after OWCP's October 16, 2019 decision. Therefore, OWCP properly determined that his reconsideration request was untimely filed.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹⁸ See *G.B.*, Docket No. 18-1629 (issued April 15, 2019); *P.B.*, Docket No. 18-0265 (issued September 5, 2018); *D.E.*, 59 ECAB 438 (2008).

¹⁹ See *N.V.*, Docket No. 20-0781 (issued November 18, 2020); *T.B.*, Docket No. 21-0045 (issued June 2, 2021).

²⁰ See *P.T.*, Docket No. 18-0494 (issued July 9, 2018).

²¹ *Supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the November 9, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board